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In The

Supreme Court of the United States

October Term, 1997

SHEILA-GOLD, DONALD A. BARNETT, RONDA CHANEY, LON CHANEY, JR., WILLIAM MITCHELL and ROBERT Q. BUICKEROOD,

Petitioners,

vs.

GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, ROBERT BATINOVICH and ANTHONY BLUMBERG,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), this Court held that, in a class action lawsuit that seeks predominantly money damages, minimum due process requires that absent class members be allowed to exclude themselves from the lawsuit. The petition for a writ of certiorari now before the Court seeks this Court's review of a California state court judgment which (1) certified a mandatory non-opt out class and (2) approved a settlement which extinguished substantial claims for damages held by the members of the plaintiff class. Petitioners assert that the actions of the California courts violated their right to due process under the Fourteenth Amendment by releasing their claims, and the claims of the other absent class members, for money damages without allowing class members to exclude themselves from the plaintiff class.

In the last five years, this Court has *twice* granted certiorari regarding the issue presented in Petitioners' petition. Twice, however, the Court has dismissed those petitions as improvidently granted.[1] The issue is once again presented for the Court's consideration: whether the certification and settlement of a class action, without affording class members the right to opt out of the class or the settlement, violates the constitutional right of due process, where the class members possess substantial claims for monetary relief which are foreclosed by the settlement. For the reasons stated herein, and in Petitioners' petition, this Court should issue a Writ of Certiorari to the California Court of Appeal and undertake a review of the constitutionality of this issue.

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[1] *Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994); *Adams v. Robertson,* 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997).

II. ARGUMENT

A. This Court Should Resolve A Split Amongst The Federal Circuit Courts and Between the Federal and California Courts Regarding An Important Constitutional Issue

In opposition to Petitioners' petition, Respondents suggest that the California Court of Appeal below applied this Court's decision in *Shutts* in a conventional manner, and that there is no conflict between that court and any other regarding the due process principles applicable to mandatory class certification. The truth, however, is otherwise. Indeed, in a recently issued opinion, the Fifth Circuit effectively requested that this Court provide further guidance regarding the application of *Shutts*. *Allison v. Citgo Petroleum Corp.*, No. 96-30489, 1998 U.S. App. LEXIS 20171 at *18 n.3 (5th Cir. August 18, 1998) (hereinafter "*Allison*").

Contrary to Respondents' contention, ever since this Court handed down its opinion in *Shutts*, the lower courts and the litigants appearing before them have struggled to determine when, in a class action seeking both injunctive relief and money damages, the former or the latter component "predominates." As a consequence, the Fifth and Ninth Circuits and the California state court all apply different standards to determine "predominance." As is discussed in more detail below, the Fifth Circuit has held that damages predominate whenever they are not incidental to the claims for injunctive or declaratory relief asserted, while the Ninth Circuit has held that, where the claims released in a class action settlement are "substantial," class members must be permitted to opt out of a class action settlement.

The California Court of Appeal, however, has adopted its own standard, one which (to Petitioners' knowledge) no federal court has ever followed. That court has held that ***claims for equitable relief need only be "substantial" to predominate***, and that the trial court has virtually unfettered discretion in making that determination.

There also exists a split between the Third Circuit and the Ninth Circuit as to when due process requires that class

members be allowed to opt out of a class action in which claims for money damages predominate. The Ninth Circuit has held that all class members are entitled to these protections, while the Third Circuit has held that only those class members that are beyond the *in personam* jurisdiction of the trial court are so protected.

B. Issues Presented In The Application of *Shutts*

Two distinct but interrelated issues arise in the settlement of these hybrid class action lawsuits. Specifically, the issues are:

A. At what point do claims for damages predominate over claims for equitable relief? and

B. What means should the courts use to measure claims for damages versus equitable relief?

Each court that has undertaken to apply *Shutts* to a class action has had to contend with these issues.

1. The Determination of When Damages Predominate Has Resulted In a Split of Authority

In *Allison*, the Fifth Circuit Court of Appeals affirmed the denial of mandatory class certification of claims for injunctive relief and money damages brought under Title VII of the Civil Rights Act of 1964.[2] After noting that "the predomination requirement serves to protect the rights of class members regarding their monetary interests" (*Allison* at *27), the Fifth Circuit determined that, in class actions seeking both injunctive relief and damages, claims for money damages predominate "unless [they are] incidental to the requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Id.* at *30. The Fifth Circuit then found that the monetary relief requested in that action, including compensatory and punitive damages and attorney's fees and

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[2] 42 U.S.C §2000(e).

costs, would require "particularly individualized proof of injury" and "were not sufficiently incidental to the injunctive and declaratory relief being sought to permit them in a (b)(2) class action." *Id.* at 36-37.

Thus, the Fifth Circuit has found that, under *Shutts*, claims for money damages predominate in a class action lawsuit whenever such claims are anything other than incidental to the declaratory relief sought. Under this standard, the certification of the settlement class in the action below was clearly improper.

The Ninth Circuit Court of Appeals has taken a middle road. In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994), that court held that minimum due process requires that parties be given a right to opt out of a class action settlement and certification of a mandatory class where that settlement results in the "foreclosure of substantial claims for money damages." *Id.* at 392. The Ninth Circuit recently applied this standard in *Linney v. Cellular Alaska Partnership*, No. 97-16637, 1998 U.S. App. LEXIS 20484 (9th Cir. August 21, 1998). In that action, the appellate court affirmed the approval of the settlement of a class action seeking both equitable relief and money damages. The Court of Appeals found that the equitable relief obtained in settlement was valued at up to $34 million, while the cash settlement was, at best, only $4 million after costs and attorneys' fees. *Id.* at *13. The court therefore held that claims for money damages did not predominate, and therefore due process did not require that class members be given the right to opt out. *Id.*, citing *Brown v. Ticor Title*, 982 F.2d at 392.[3]

The Third Circuit has yet a different response to *Shutts*. That court has held that, in a class action involving claims for equitable relief and money damages, a mandatory no opt out

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[3] *Linney* contains no discussion of the amount of damages, if any, that were foreclosed by the settlement. Because the *Linney* court relied on *Brown* as circuit precedent, it can be inferred that it concluded that any claims for damages that were foreclosed by the settlement were not "substantial." *See, Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir. 1997) ("Only an en banc panel may overturn existing Ninth Circuit precedent").

class may be certified and the claims for money damages, even if they predominate, may be extinguished in a settlement, so long as the trial court has *in personam* jurisdiction over the members of the plaintiff class. *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 and 1560 n.8 (3d Cir.), *cert. denied*, 513 U.S. 985 (1994). The Ninth Circuit, however, has expressly rejected this approach, finding that the Third Circuit "conflates the requirements of *in personam* jurisdiction with the due process safeguards that *Shutts* guarantees to absent class members . . . " *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1242 (9th Cir. 1997).[4]

The California courts have adopted a much more permissive standard than any of the federal courts in response to this Court's ruling in *Shutts*. In *Bell v. American Title Ins. Co.*, 226 Cal.App.3d 1589 (1991), the Court of Appeal found that *Shutts* "does not compel a due process right to opt out" of actions containing "significant" claims for equitable relief. Instead, the California court found that, where an action contains "significant" claims for equitable relief, it is "within the trial court's discretion to find the case [is] not predominately for monetary relief." *Id.* at 1609-10 And, in both *Bell* and in the action below, the California courts held that the trial court's findings regarding may be "implicit." *Id.* at 1606, App. 22.

The scope of this standard is startling, particularly when compared to those applied by the Fifth and Ninth Circuits. Under the California standard, a mandatory class in settlement of a class action lawsuit will be approved as long as the court concludes that the action raises "substantial" claims for declaratory or injunctive relief. No findings of fact or analysis

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[4] Respondents' citation to *Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1997) in support of a purported uniform national application of *Shutts* is inapposite. In that action, the Court of Appeals for the District of Columbia held that a trial court, in its discretion, may permit class members to opt out of a class certified under Rule 23(b)(2). *Id.* at 233-34. The due process protections set forth in *Shutts* are never discussed in that opinion.

of the claims need be undertaken to support such a determination. Instead, the finding need only be "implicit" and thereby effectively beyond review.

2. The Manner In Which Damages and Equitable Relief Are Measured Has Resulted In a Split of Authority

The second issue relating to the application of *Shutts*, how courts determine whether claims for injunctive relief or claims for money damages predominate for the purposes of settlement, also sharply differ from court to court. As discussed, the Ninth Circuit has held that, in the case of a settlement which includes a non-opt out class, courts should look at the claims *foreclosed by the settlement* to determine whether due process mandates that class members be permitted to opt out. *Brown*, 982 F.2d at 392. Petitioners submit that this is the appropriate measure, in that the due process rights that are being protected are those which attach to the claims possessed by the absent class members, and it is these claims that the proponents of a mandatory settlement are asking the courts to extinguish.

The California state courts, by contrast, look to the complaint and the relief obtained in the settlement, and give short shrift to the claims released. App. 22. Moreover, under the California standard, the decision is completely within the "considerable" discretion of the trial court, and will not be overturned absent an abuse of that discretion. *Bell*, 226 Cal.App.3d at 1603; see also App. 22 (trial court has "broad discretion" in determining predominance). And, as discussed, the trial court need not articulate any analysis of the constitutional issue. Any findings with respect to the due process rights of absent class members may be "implicit" in the order certifying a no opt out class. App. 22 n.7.

C. There Is A Split Of Circuit Authority Concerning the Scope of Due Process Protection

Respondents next assert that Petitioners had minimum contacts with the forum state by virtue of their ownership of

partnership interests in a California limited partnership. Relying on *Grimes, supra*, Respondents argue that the *in personam* jurisdiction purportedly conferred by that ownership is a sufficient substitute for the due process right to opt out of a class action settlement that released substantial claims for damages.

The Ninth Circuit, however, has explicitly rejected *Grimes*. *Epstein*, 126 F.2d at 1214. That court found that "[t]here is nothing in *Shutts* . . . – or any other case – to suggest that *Shutts* offers protection only to those absentees who are beyond the *in personam* reach of the forum. Because *Grimes* conflates the requirements of *in personam* jurisdiction with the due process safeguards that *Shutts* guarantees to absent class members, we respectfully decline to follow it." *Id*.

Respondent's argument that *in personam* jurisdiction is a substitute for a due process right to opt out of a settlement that extinguishes substantial claims for damages merely reveals yet another conflict between the Circuits, and yet another reason for this Court to grant Petitioner's petition for certiorari. This Court should therefore undertake to resolve this conflict, and provide necessary guidance to the lower courts.[5]

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[5] Respondents further argue that Petitioners do not have standing to challenge the certification of a mandatory class because they have voluntarily submitted to the personal jurisdiction of the forum by appearing in court to object to the settlement on the merits. Glenborough Opp. at 28. However, as discussed above, the due process right to opt out does not depend on the existence or absence of personal jurisdiction over a particular member or members of the class – all absent class members have a right to opt out. *Epstein*, 126 F.3d at 1242. In any event, Respondents' contention that a class member "acquiesces" in a violation of his due process rights and subjects himself to personal jurisdiction merely by appearing to contest the merits of a settlement is not only unfair but impractical. Where, as here, notice of a settlement is given at the same time as notice of class certification, a class member must be permitted to raise whatever objections he or she has on the merits at the same time as any objections to class certification. To do otherwise would put class members

D. A Mandatory Class Cannot Be Certified When Certification Deprives Class Members Of Their Due Process Rights

It seems axiomatic that a plaintiff class may be certified under state or federal rules of procedure but still offend the constitutional rights of the absent class members. Indeed, such was this Court's ruling in *Phillips Petroleum Co. v. Shutts*. Respondents, however, ignore the supremacy of the United States Constitution over state and federal rules of procedure.

Specifically, Respondents assert that the settlement class was properly certified by the trial court using Rule 23(b)(1)(A) because there was a "risk of inconsistent judgments." At the same time, however, the settlement released substantial claims for damages. And, as this Court has held, minimum due process requires that, where such claims "predominate," class members be given the opportunity to opt out. *Shutts* 472 U.S. at 812. Due process, however, requires that absent class members be provided the opportunity to opt out of *any* class which forecloses substantial claims for lawyers.

The means of certification of a class does not take precedence over the constitutional rights of the members of the class. Rather, it is for the courts and litigants to accommodate those rights in the certification of a class. It would seem obvious that the solution would be to permit certification of claims for injunctive and declaratory relief under Rule 23(b)(1)(A), while permitting class members to exclude themselves from the class as to any claims for money damages. Such was the approach of the Ninth Circuit in *Brown*, wherein the court held that, although class members were barred by res judicata from attempting to relitigate the injunctive relief

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in an untenable situation: If they object on the merits, they may be held to have waived an objection to personal jurisdiction; if they do not object on the merits, they may be held to have waived their objections on the merits, both in the trial court and on appeal. Such a rule would make review of an unconstitutional class certification order effectively impossible to obtain.

granted the class, those class members were not barred from pursuing claims for damages. *Brown*, 982 F.2d at 392.

Respondents also assert that the claims brought by plaintiff Blumberg were "predominantly" equitable, and therefore certification pursuant to Rule 23(b)(2) was appropriate. Respondents, like the courts below, fail to consider the value of the claims released by the settlement (estimated at $10-20 million), and instead focus exclusively on the claims asserted in the complaint. As discussed in the Petition, the original claims for injunctive relief were rendered moot by the time the settlement was approved by the trial court. The Roll-Up had already occurred, and the trial court could therefore not be asked to enjoin that transaction. Nor could the class be given rescission, because the new entity was already being traded on the New York Stock Exchange. Thus, at the time the trial court held hearings on the proposed settlement, only two forms of relief were available to the class: (1) the injunctive relief actually obtained in the settlement, which was virtually worthless, and (2) claims for money damages resulting from the unfair allocation of equity in the new entity to the General Partners.[6]

Here, however, as part of a mandatory non-opt out settlement, the plaintiff below released what was, by his own estimate, class damages of between $10 and $20 million, in return for no tangible benefit to the class. Such claims cannot be fairly characterized as "incidental."

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[6] Respondents' citation to *Scott v. Anniston, Alabama*, 682 F.2d 1353 (11th Cir. 1982) and other cases for the proposition that actions taken by a defendant after a lawsuit is filed do not change the nature of the lawsuit are inapposite. First, none of these opinions concern a class action settlement. Second, all of these opinions predate this Court's decision in *Shutts*. Even if these opinions did concern issues pertinent to the subject matter of the petition (and they do not), their viability today would be open to question.

E. Petitioners Have Standing To Seek a Writ of Certiorari

Finaliy, Respondents assert that, because the constitutional issues implicated by the certification of a mandatory class were first raised below by another group of objectors, Petitioners may lack standing to bring this petition. Glenborough Opp. at 28. However, California law clearly provides that an appellant may argue on appeal any issue raised by another party below. *E.g., Ward v. Taggart*, 51 Cal.2d 736, 742 (1959). The trial court heard and decided the issue presented to this Court by the petition. The issue was raised by Petitioners in the California Court of Appeal, which also heard and decided it. App. 18-24. The disability that prevented this Court from deciding the issue presented in *Adams v. Robertson* is therefore absent here.

III. CONCLUSION

For the reasons stated herein, and in the petition on file, this Court should issue a Writ of Certiorari to the California Court of Appeal and review the decision of the courts below that denies Petitioners and all those similarly situated their constitutional right to due process of law.

Respectfully submitted,

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